80-489

No.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS A. DUZAC, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DEFENDANT'S FIFTH AND/OR SIXTH AMENDMENT RIGHTS TO AN IMPARTIAL JURY WERE VIOLATED WHERE, DURING THIS SECOND DAY OF ITS DELIBERATIONS, THE JURY ARTICULATED TO THE COURT, IN WRITING, THAT "THERE ARE CERTAIN PREJUDICES AMONG THIS JURY DUE TO PRIOR PERSONAL EXPERIENCES THAT PREVENT US FROM ARRIVING AT A UNANIMOUS DECISION. . ."

2. WHETHER DEFENDANT'S MOTION FOR A MISTRIAL SHOULD HAVE BEEN GRANTED ONCE IT WAS LEARNED THAT ADMITED PERSONAL PREJUDICES AMONG CERTAIN JURY MEMBERS HAD SURFACED DURING VERDICT DELIBERATIONS AND WERE ADVERSELY IMPACTING, AND/OR HAD ALREADY TAINTED THE JURY'S ABILITY TO IMPARTIALLY DELIBERATE.

3. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A POST-VERDICT EVIDENTIARY HEARING AT WHICH DEFENDANT'S ATTORNEYS COULD BE PRESENT TO AT LEAST OBSERVE AND LEARN OF THE ADMITTED PREJUDICES OF MEMBERS OF THE JURY AS INQUIRED INTO BY THE COURT'S POST-TRIAL *IN CAMERA* INTERVIEW OF THE JURY FOREMAN.

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PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals appears at 622 F.2d 911 (5th Cir. 1980) and affirmed the judgment of the District Court for the Eastern District of Louisiana. Both opinions appear in the appendix hereto as Appendices A and B, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 1, 1980, and this Petition for Certiorari was filed within sixty days from such date. The jurisdiction of this Honorable Court is invoked pursuant to Title 28, Section 1254(1), United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the *United States Constitution* provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment of the *United States Constitution* provides in pertinent part:

> "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the State and district wherein the crime shall have been committed, . . ." (emphasis added)

STATEMENT OF THE CASE

On August 30, 1979 a three-count indictment was returned charging two New Orleans Police Officers,

defendants Duzac and Reynolds, with one count each of lying to a grand jury in violation of 18 U.S.C.A. §1622. Defendant Duzac was charged with an additional count of deprivation of civil rights in violation of U.S.C.A. §242. After a joint trial by jury, defendant Reynolds was acquitted and defendant Duzac was found guilty on both counts.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of conviction.

At issue is the fact that, during the second day of jury deliberations, on a Saturday morning following a four-day trial, the jury sent the following written message to the trial judge:

> "There are certain prejudices among this jury due to prior personal experiences that prevent us from arriving at a unanimous decision on Count I. We have spent almost the entire time trying to come to a verdict since yesterday on Count I. We are hung!"

The District Judge read this communication from the jury to all counsel in his Chambers. Attorneys for the defendant immediately moved for a mistrial. The motion was denied. Instead, the Court wrote a note to the jury and admonished them to put aside their prejudices and render a verdict. The jury thereupon re-

sumed its deliberations and, approximately one hour later, returned with unanimous verdicts of guilty on both counts as to Defendant Duzac.

Thereafter, defense counsel filed a Motion for Evidentiary Hearing, Judgment of Acquittal, and/or Motion for a New Trial, all based upon the jury's articulated prejudices during the course of its deliberations and prior to rendering its verdict. The trial judge denied the defense motions, but did agree to conduct, by itself and without counsel present, an *in camera* interview of the jury foreman only. Counsel requested permission to attend and observe, but this was denied.

The trial judge sentenced defendant Duzac to six (6) months imprisonment as to Count 2 of the Indictment (Making False Declarations Before the Grand Jury), and suspended imposition of sentence on Count 1 (Deprivation of Rights Under Color of Law), and placed defendant on probation on that latter Count for a period of three (3) years; with probation to commence upon defendant's release from custody for the sentence of imprisonment imposed under Count 2.

ARGUMENT

The Fifth Circuit panel cited no authority whatsoever for its assertion that:

> "Although the jury is obligated to decide the case solely on the evidence, its verdict may

not be disturbed if it is later learned that personal prejudices were not put aside during deliberations." *Duzac, supra,* at p. 913. (App. 9a)

The Court of Appeals suggested that the proper time to discover such prejudices is during *voir dire* when peremptory challenges are available to the parties. It is respectfully submitted that, (particularly where, such as in this case, the *voir dire* inquiries are conducted solely by the trial judge himself), it is impossible to anticipate a juror's repression of, and/or failure to maintain or articulate prejudices which later surface after the presentation of the evidence and arguments have been concluded, but while the jury is deliberating its verdict.

This case compels consideration of the fundamental constitutional due process principle of fairness and impartiality in a criminal proceeding. It does not challenge the sanctity of our system of trial by jury, but rather seeks to re-enforce and assure the preservation of the important element of impartiality without which the entire system would be meaningless.

The case does not, as is seemingly suggested by the Fifth Circuit's panel, involve any disturbance of a jury's verdict where:

"it is *later* learned that personal prejudices were not put aside during deliberations." *United States v. Duzac,* 622 F.2d 911 (5th Cir. 1980) at p. 913. (emphasis added) (App. 9a)

Instead, the facts in this case clearly and indisputably show that the trial court and counsel were apprised by the jury *during the course of its deliberations* and *prior to the rendition of its verdict*, of the fact that personal prejudices had surfaced and *were* tainting the jury's attempt to deliberate.

Simply stated, what should happen where, as in this case, the trial judge's *voir dire* and the peremptory challenges do not disclose or purge the jury of prejudiced members, and during the course of the jury's deliberations, these prejudices and their effect are openly admitted by the jury to the trial court? Notwithstanding the Court of Appeals' Answer to this important question, it should be remembered that the immediate relief sought to cure this surprise indication of a lack of jury impartiality was immediately requested by defense counsel *prior to* the jury's resumption of its deliberations, and not after it had ultimately rendered its verdict.

In *Clark v. United States*, 289 U.S. 1, 11, 53 S.Ct. 465, 468, 77 L.Ed. 993, Mr. Justice Cardozo spoke of outright nullification of a proceeding *where one of the jurors failed on the voir dire to come forward with information affecting her impartiality:*

> "There is a distinction not to be ignored between deceit by a witness and deceit by a talesman. A talesman when accepted as a

juror becomes a part or member of the court. In re Savin, 131 U.S. 267, 9 S.Ct. 699, 33 L.Ed. 150; United States v. Dachis, D.C., 36 F.2d 601. The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an *impartial arbiter.* What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different. *The doom of more sterility was on the trial from the beginning."* (emphasis added)

The same fundamental unfairness and denial of due process was found in *United States ex rel. deVite v. McCorkle,* 248 F.2d 1 (3rd Cir. 1957). That case involved the presence of a juror who had been held up and robbed a short time prior to the crime being prosecuted (felony-murder arising out of an armed robbery). Based on the colorable bias displayed by a juror, the writ of *habeas corpus* was granted, and a new trial allowed.

The jurors took a solemn oath prior to hearing the evidence wherein they agreed to render an unbiased

decision. Moreover, they were properly instructed by the District Judge to obey his rulings and render a fair decision. Despite all these admonitions, members of the jury suffered from innate prejudices that they intentionally concealed or were unaware of until after the trial had commenced.

Once this flaw became evident and surfaced, however, it tainted the entire judicial process and mandated a new trial.

The Fifth Circuit Court of Appeals' opinion states:

> "Here, there is no evidence that any external influence was brought to bear on members of the jury. The prejudice complained of is alleged to be the product of personal experiences unrelated to this litigation. The proper time to discover such prejudices is when the jury is being selected and peremptory challenges are available to the attorneys. Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations. We therefore hold that the trial court acted properly in denying appellant's motion for a new trial." *Duzac, supra,* at 913. (App. 8a-9a)

With all due respect, there is evidence of external influences that were brought to bear on members of the

jury, i.e., prejudices due to prior personal experiences. It is further urged that the jury verdict should be disturbed, or at the very least, investigated if it is later learned that personal prejudices entered into the deliberations.

Should this Honorable Court decide against vacating the jury verdict summarily, then defendant requests as an alternative form of relief, a post-verdict evidentiary hearing to question the individual or individuals who suffered the actual prejudices based on prior personal experiences. The remaining members of the jury should be interrogated to ascertain how they were affected by this phenomenon.

Were these prejudices isolated to a single individual? Were the prejudices directed to one or both of the defendants? How recent were the personal experiences that formed the basis of the prejudices? What was the individual or individuals' reaction to the admonition by the Court?

One salient point that remains an issue is the fact that only one individual was interviewed by the Court, i.e., the foreman of the jury. Certainly, if another person or persons admitted to the prejudice based upon prior personal experiences, that individual should be interviewed to assure full protection of the defendant's fundamental constitutional right to a fair trial.

CONCLUSION

Because of the above enumerated facts and prejudices admitted and articulated by the jury during its deliberations and prior to rendering its verdict, and the actions by the trial court, the petitioner, Louis A. Duzac, Jr., was denied a fair trial and due process as guaranteed by the *United States Constitution*, Amendments V and VI, and is therefore entitled to a reversal of the judgment below, or in the alternative, at least to a new trial by an impartial jury.

Respectfully submitted,

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(504) 523-3141
Attorneys for Petitioner,
LOUIS A. DUZAC, JR.

CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing petition were served on the Solicitor General of the United States, Department of Justice, Washington, DC 20530; one copy has been served on Morris Reed, Assistant U.S. Attorney, 500 Camp Street, Hale Boggs Building, New Orleans, Louisiana 70130, by depositing in the U.S. mails with adequate postage affixed thereto. All parties required to be served have been served.

New Orleans, Louisiana, September ____, 1980.

Sidney M. Bach

APPENDIX A

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

versus No. CRM. 79-377 "D"

LOUIS A. DUZAC, JR.,
Defendant.

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on December 5, 1979, with counsel, Sidney Bach, Esq. and Gerald Wasserman, Esq.

There being a verdict of guilty to counts 1 and 2 by the jury on November 10, 1979, Defendant has been convicted as charged of the offenses of Title 18, U.S.C., Section 242 and Title 18, U.S.C., Section 1623 — CIVIL RIGHTS LAWS AND FALSE DECLARATIONS BEFORE A GRAND JURY, AS CHARGED IN THE INDICTMENT.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months as to count 2. As to count 1, imposition of sentence is suspended and the defendant is placed on probation for a period of three (3) years. Said term of probation shall commence upon defendant's release from custody under the sentence imposed on count 2.

* * *

/s/ EDWARD J. BOYLE, SR.
EDWARD J. BOYLE, SR.
U.S. DISTRICT JUDGE

Dated: December 5, 1979.

CLERK'S OFFICE:
A TRUE COPY

/s/ JANE NASSAUER
JANE NASSAUER
Deputy Clerk,
United States District Court
for the Eastern District of Louisiana
New Orleans, La.

APPENDIX B

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LOUIS A. DUZAC, JR.,
Defendant-Appellant.

No. 79-5715

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Aug. 1, 1980.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before HILL, GARZA and THOMAS A. CLARK.

JAMES C. HILL, Circuit Judge:

Under the misconception that they had their man, several members of the New Orleans Police Depart-

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* Fed.R.App. Proc. 34(a), 5th Cir. Local R. 18.

ment wrongfully arrested Darrell Land. Despite his protests, Land was brutally beaten and verbally abused by the officers, and repeatedly bitten by a police attack dog. Appellant Duzac and a fellow officer, Reynolds, both were involved in the incident. Both officers testified about the matter before a grand jury. A three-count indictment was returned, charging Reynolds and Duzac with one count each of lying to a grand jury, 18 U.S.C.A. §1623, and Duzac with one count of willfully depriving Land of his civil rights, 18 U.S.C.A. §242. After a joint trial, Duzac was found guilty on both counts and Reynolds was acquitted.

I. *Joinder; Severance*

Pursuant to Fed.R.Crim.P. 14, appellant requested that he be tried separately from Reynolds. Appellant wanted Reynolds to testify on his behalf. Reynolds did not take the stand. Appellant contends that the district court erred in not granting severance because Reynolds "might have elected to testify were this not a joint criminal trial." Brief for Appellant at 8.

In order to succeed on a Rule 14 motion, the defendant must show specific and compelling prejudice. *United States v. Wolford*, 614 F.2d 516, 517 (5th Cir. 1980); *United States v. Morrow*, 537 F.2d 120, 138 (5th Cir. 1976). Where the motion is based on the defendant's asserted need for a co-defendant's testimony, we have a more detailed test. First, the defendant must demonstrate:

(1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the codefendant will in fact testify if the cases are severed. *United States v. Butler*, 611 F.2d 1066, 1071 (5th Cir. 1980); *United States v. Rice*, 550 F.2d 1364, 1369 (5th Cir.), *cert. denied* 434 U.S. 954, 98 S.Ct. 479, 54 L.Ed.2d 312 (1977); *United States v. Morrow*, 537 F.2d at 135.

If the defendant makes such a showing, the district court must: (1) examine the significance of the testimony in relation to the defendant's theory of defense; (2) assess the extent of prejudice caused by the absence of the testimony; (3) pay close attention to considerations of judicial economy; and (4) give weight to the timeliness of the motion. *United States v. Butler*, 611 F.2d at 1071; *United States v. Rice*, 550 F.2d at 1369; *United States v. Morrow*, 537 F.2d at 135.

Appellant argues that Reynolds "was in a unique position to provide exculpatory evidence" and "might have elected to testify" had separate trials been held. Brief for Appellant at 7-8. Presented with such generalized, vague and speculative assertions, the trial court's decision to deny the request for severance was entirely appropriate.

Appellant also contends that it was improper to join the perjury count with the count charging a willful violation of Land's civil rights.

Under Rule 8 of the Federal Rules of Criminal Procedure, separate offenses may be joined in a single indictment when they "are based on the same act or transaction." Fed.R.Crim.P. 8(a). The statements upon which the perjury count is based were made during the grand jury's inquiry into the Land incident. The statements concerned Reynolds' involvement and may properly be said to have been part of the same transaction. Joinder of the perjury count with the count charging a violation of Land's civil rights was therefore proper. *See McElroy v. United States*, 164 U.S. 76, 79-81, 17 S.Ct. 31, 32-33, 41 L.Ed. 355 (1896); *United States v. Barney*, 568 F.2d 134, 135-36 (9th Cir.), *cert. denied*, 435 U.S. 955, 98 S.Ct. 1586, 55 L.Ed.2d 806 (1978); *United States v. Gill*, 490 F.2d 233, 238 (7th Cir. 1973).

II. *The Verdict*

During the second day of deliberations, the jury sent the following message to the trial judge:

> There are certain prejudices among this jury due to prior personal experiences that prevent us from arriving at a unanimous decision on Count I. We have spent almost the entire time trying to come to a verdict since yesterday on Count I. We are hung!

After consulting both attorneys, the judge decided to respond to the note by reminding the jurors of their obligation to decide the case on the evidence and with-

out regard to prejudice or sympathy. Appellants' attorney moved for a mistrial. The motion was denied and the judge's response sent to the jury in the form of a note. Shortly thereafter, the jury returned unanimous verdicts on each count. When polled, all jurors adhered to the verdicts. Some weeks after the jury was dismissed, the judge interviewed the foreman about the note. The interview was transcribed and the transcript sealed. The transcript has not been made available to either attorney.[1]

Appellant's first contention is that, upon learning that one or more of the jurors had certain prejudices because of prior personal experiences, the judge should have declared a mistrial. Appellant attempts to bring this case within an exception to the rule prohibiting jurors from impeaching their verdict, *see McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915). That exception allows a court to set aside the verdict where there is evidence that improper external influences were brought to bear on one or more of the jurors. *See Mattox v. United States*, 146 U.S. 140, 148-50, 13 S.Ct. 50, 52-53, 36 L.Ed. 91 (1892); *Llewellyn v. Stynchcombe*, 609 F.2d 194 (5th Cir. 1980); *United States v. D'Angelo*, 598 F.2d 1002 (5th Cir. 1979). Here, there is no evidence that any external influence was brought to bear on members of the jury. The prejudice complain-

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1 Appellant's motion to inspect the transcript was earlier denied by this Court. In view of our holding today, we find it unnecessary to reconsider that motion.

ed of is alleged to be the product of personal experiences unrelated to this litigation. The proper time to discover such prejudices is when the jury is being selected and peremptory challenges are available to the attorneys. Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations. We therefore hold that the trial court acted properly in denying appellant's motion for a new trial.

In a closely related argument, appellant urges error in the court's failure to hold an evidentiary hearing to pursue the matter further.

Post-verdict "[i]nquiries that seek to probe the mental process of jurors . . . are impermissible." *Llewellyn v. Stynchcombe*, 609 F.2d at 196; *accord, Mattox v. United States*, 146 U.S. 140, 148-50, 13 S.Ct. 50, 52-53, 36 L.Ed. 91 (1892). Rule 606(b) of the Federal Rules of Evidence gives effect to that principle by prohibiting a juror from testifying "to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict . . . [or to] his mental process in connection therewith . . ." Fed.R.Evid. 606(b). Excepted from Rule 606(b) is testimony about whether any external influences were brought to bear on the jury. Neither the note nor the post-trial interview with the foreman provided the judge with reason to hold an evidentiary hearing. The only questions that

the trial judge might have asked at a hearing would have concerned the jurors' prejudices and, therefore, would have been impermissible. Under these circumstances, the judge did not abuse his discretion in failing to hold a hearing.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5715
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus Doc. No. 79-377 "D"

LOUIS A. DUZAC, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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Filed: September 16, 1980

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 1, 1980

A true copy.

GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ BETTY G. MARTINEZ
Deputy
New Orleans, Louisiana

ISSUED AS MANDATE: SEPTEMBER 15, 1980

APPENDIX D

EXHIBIT "COURT 1"

There are certain prejudices among this jury due to prior personal experiences that prevent us from arriving at a unanimous decision on Count I. We have spent almost the entire time trying to come to a verdict since yesterday on Count I. We are hung!

/s/ LOWELL DEVER

Members of the Jury:

I call your attention to the fact that *all* of you have taken an oath to decide this case *solely* on the evidence you have heard and the law applicable as stated to you in my instructions and *without prejudice or sympathy.* Our oath and the law requires you to *carefully and impartially* to consider all of the evidence and follow the law given you in my charge in order to reach a *just verdict,* regardless of the consequences to the prosecution or the accused. The parties and the public expect nothing less.

/s/ JUDGE EDWARD J. BOYLE, SR.